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Recommended Citation

Robert A. Destro, Emerging Trends in Religious Liberty, 8 EUR. J. CHURCH & ST. RES. 368 (2001).

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EMERGING TRENDS IN RELIGIOUS LIBERTY DURING THE 2000-2001 TERM OF THE UNITED STATES SUPREME COURT

ROBERT A. DESTRO

From a religious liberty perspective, the October 2000 Term of the United States Supreme Court was relatively uneventful. The Court decided only one case raising significant religious liberty concerns, *Good News Club v. Milford Central School*¹. *Good News Club* case adds little to the First Amendment case law already on the books, but it does provide an excellent opportunity to highlight the growing need for well-informed scholars, both American and foreign, to examine the relationships between and among the clauses of the First and Fourteenth Amendments to the Constitution of the United States.

I. REVIEWING THE CASE LAW: RELIGIOUS LIBERTY IN THE OCTOBER TERM, 1999

A. Theoretical Background

Religious liberty claims against state and local governments are based on the first amendment, as applied to the states through sections one and five of the fourteenth amendment. The first amendment and fourteenth amendments provide, in relevant part:

Amendment I: *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*².

Amendment XIV: *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the*

¹ 533 U.S. 98, 121 S.Ct. 2093 (2001).

² U.S. Constitution, amend. I (1791).

State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5: *The Congress shall have power to enforce, by appropriate legislation, the provisions of this article*³.

Because the first amendment, by its terms, applies only to the federal government's actions ("Congress shall make no law..."), there is no clear warrant for federal intervention into state-level matters dealing with religious freedom. Since the 1940s, however, the United States Supreme Court has held that the Due Process Clause of the fourteenth amendment⁴ "incorporates" (or simply, "includes") liberty interests that a majority of the Court is willing to characterize as "fundamental". The Free Exercise Clause of the First Amendment was applied to the States in 1940⁵ and the Establishment Clause in 1947⁶, but the Court has not spent much time since elaborating either the source of federal power to define the permissible scope of the religious liberty guarantee, or its own view of the relationships between and among the guarantees contained in the first and fourteenth amendments⁷. It is only when the case law seems to indicate a head-on collision between one or more of these guarantees, or between and among the sovereign authorities empowered to make rules affecting religious liberty, freedom of speech and press, and the rights of free association and petition for redress of grievances, that we get a good indication of the Court's views on these subjects. *Good*

³ *U.S. Const.*, Amend. XIV §§ 1, 5 (1868). See *City of Boerne v. Flores*, 521 U.S. 507, 517-521, 117 S.Ct. 2157 (1995).

⁴ The Due Process Clause of the fourteenth amendment provides, in relevant part: "...nor shall any State deprive any person of life, liberty, or property, without due process of law..."

⁵ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

⁶ *Everson v. Board of Education*, 330 U.S. 1 (1947).

⁷ See generally, DESTRO, R.A., "By What Right?: The Sources and Limits of Federal Court and Congressional Jurisdiction Over Matters 'Touching Religion'", *Indiana Law Review*, 29, 1(1996); DESTRO, R.A., "The Structural Components of Religious Liberty," in Symposium in Honor of Judge John Noonan, *Journal of Law & Religion*, 11(1995), 355; DESTRO, R.A., "Equal Treatment: Implications for Nonprofit Organizations", in MONSMA, S.V. and SOPER, C. (ed.), *Equal Treatment of Religion in a Pluralistic Society*, 1998; DESTRO, R.A., "Citizenship and Community: Legacy and Challenge", in BOXX, T.W. and QUINLIVAN, G.M. (ed.), *Law and the Free Society*, Pennsylvania, St. Vincent College, Latrobe 1998: <http://facweb.stvincent.edu/Academics/cepe/Articles/Destro.htm>.

News Club is, at bottom, an extended discussion of the relationship between freedom of speech and freedom of religion and, as such, it provides some much-needed guidance for the state and lower federal courts.

B. Freedom of Religious Speech and Press

Even were the two concepts not inextricably intertwined in the First Amendment, religious liberty and freedom of speech and of the press would go hand-in-hand⁸. For some, the "First Freedom" is religious liberty, because it is in the realm of conscience and ethics that individuals and groups formulate conceptions of "the good" that will later be translated into the ideas, words, and phrases that animate political action. For others, it is freedom of speech and the press, because these two rights make it possible to mobilize the political community to protect all of the others.

The following chart applies general principles of characterization to freedom of religious speech and press. Bear in mind as you examine the chart that the character of the right ("religious speech and press") will depend on how the nature of its subject ("religion") is characterized.

| | SPEECH & PRESS |
|---|--|
| Abstract formulation (high level) ↓ LEVEL OF GENERALITY ↑ Specific formulation (low level) | Non-association with disagreeable messages. |
| | Personal autonomy. |
| | Freedom to learn about religious ideas. |
| | Access to religious information and ideas. |
| | Freedom of inquiry, information, and media. |
| | Freedom to communicate religious ideas. |
| | Freedom of religious expression and ritual. |
| | Communication of religious ideas or perspectives through symbolic representations. |
| | Personal speech or publication of religious perspectives on any legitimate subject. |
| | Personal speech or publication with respect to religion, including prayer and proselytization. |

⁸ Compare *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (reversing criminal conviction for activities related to proselytization) with *Kokkinakis v. Greece*, (1994) 17 E.H.R.R. 397 (European Ct. Human Rts) (same, under European Convention on Human Rights).

Most cases arising under the Speech and Press Clause involve a careful examination of the government's interest in regulating the content or perspective of the written or spoken word. Others discuss the government's interest in regulating "expressive conduct", "expressive association", and the right *not* to speak, to publish, or otherwise to associate with ideas one finds abhorrent.

Cases arising under the Religion Clause are generally analyzed as either "free exercise" or "non-establishment" cases. In a "free exercise case" an individual or organization alleges that its liberty to practice or observe the tenets of faith has been infringed by government regulation⁹. "Establishment Clause" ("non-establishment") cases, by contrast, generally involve an allegation that government is providing unconstitutional support for specific religious teachings, practices, or viewpoints¹⁰.

Cases like *Good News Club* are characterized as "hybrids" because they involve *both* religious liberty and freedom of speech and press.

1. *A Note on Analysis under the Speech & Press Clause*

The corpus of law developed by the United States Supreme Court under the Speech and Press Clause is enormous, but the principles of law embodied in the case law focus on one basic question: *What is the nature and extent of the government's interest in regulating the time, place, manner, content, or perspective of the written or spoken word, or of other forms of expressive activity?*

The Court does not answer this question directly. Rather, it first decides whether the particular speech is "protected" or "unprotected". Within the "unprotected" category are communicative activities that fall clearly within the government's regulatory authority, such as libel, fraud, copyright, and incitement to violent crime. Speech or publication that falls within the "protected" category can also be regulated, but the scope

⁹ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213, 92 S.Ct. 1526, 1532 (1972) (reversing conviction of Amish parent under Wisconsin's compulsory education law because of the burden it imposed on Amish religious belief and practice).

¹⁰ See, e.g., *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 833, 115 S.Ct. 2510 (1995) (State university may not discriminate in funding program against student newspaper that has religious perspective if it funds other student-run publications); *Wolman v. Walter*, 433 U.S. 229, 254, 97 S.Ct. 2593, 2608-2609 (1977) (striking field trip aid program because it constituted "an impermissible direct aid to sectarian education").

of the government's authority to do so will depend upon its ability to prove that either the setting or the risk of a specific harm requires regulation in the public interest. When the government *itself* is the speaker, or when it purchases services that involve third party speech on its behalf or on behalf of others¹¹, the questions presented are not properly understood as involving the government's interest in "regulation", but rather its own interests in controlling the content of its own messages, image, or associations.

Most of the case law arising under the Speech and Press Clauses examines the government's authority to regulate or control the dissemination of "messages" that are religious in content, perspective, or character. Since the general "test" for constitutionality in a speech and press context is the "compelling state interest" test, we begin with a set of questions common to all cases arising under the Speech and Press Clause.

1. *What is the subject and character of the speech, publication, or other form of communication? [i.e. Is the speech of a type that is presumed to be "protected" or "unprotected"?]*
 2. *What is the setting in which the speech, publication, or other form of communication occurs? [i.e. What is the government's interest in asserting or protecting control of the forum?]*
 3. *What laws or constitutional provisions serve as the source of the government's power to regulate either the communication itself, or the setting in which it takes place?*
 4. *What, specifically, does the applicable law permit or forbid?*
 5. *What constitutional provisions support the rationale used by the government to restrict the exercise of rights protected by the Speech & Press Clause or its counterparts under state law?*
 6. *What facts, if any, support the government's position?*
- The Court's conclusions concerning the "constitutional fact" in issue – whether, under these circumstances, a "compelling state interest" exists that will support the government's exercise of the power to regulate – will depend on the answers to these questions.

¹¹ Compare *Rust v. Sullivan*, 500 U.S. 173, 194-195, 111 S.Ct. 1759 (1991) (government may regulate speech of contractors who provide family planning services on its behalf because the speech is that of the government) with *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 121 S.Ct. 1043 (2001) (although federal government subsidizes legal assistance for the poor, it may not limit the scope of the arguments used by counsel for indigent clients).

2. *Religious Speech in Public Fora*

There are two types of public fora: "traditional public fora" such as parks, sidewalks, and the capitol grounds, and "limited public fora", such as civic auditoria, schools, and other public facilities made available for the use of the public. In the case of the traditional public forum, the government's interests are limited to preserving order via generally applicable "time, place and manner" restrictions. In the case of a "limited public forum", the scope of the public license to use the facility is defined by the statute or regulation that opens it for public use.

In addition to traditional and limited public fora, the United States Supreme Court has recognized that there are other, more limited, fora whose parameters render them open only to certain groups of individuals (*e.g.*, students at a state university, or the faculty and administrative staff of a public school), or open only to specific types of messages (*e.g.*, faculty mailboxes at a state university designated "for official use only"). Just as in the case of public fora, the Court looks to the parameters that define the character of the forum, and the manner in which the State enforces them.

The questions for decision in *Good News Club* were twofold: 1) Did the Milford Connecticut Central School maintain a "closed" or "open" forum for speech by the public when it opened its building for use by community groups after school hours?; 2) Did it make a difference in the constitutional argument that the building was a public school, and that children enrolled in the school would witness the private religious speech of those using the schools after hours?; and 3) If so, did the state have a "compelling state interest" in insulating the children from exposure to religious speech by closing the forum to religious speakers?

C. *Good News Club v. Milford Central School*, 533 U.S. 98, 121 S.Ct. 2093 (2001)

In *Good News Club v. Milford Central School*, the Court held (6-3) that the Milford Central School violated the Speech and Press Clause of the First Amendment when it created a limited public forum by opening its school building for use by the residents of the community after the close of the school day. Among the uses permitted by both school board policy and New York State law were "instruction in any branch of education, learning or the arts", and "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be

opened to the general public". In accordance with the Board's stated policy, the Good News Club, "a private Christian organization for children aged 6 to 12... submitted a request to [the] interim superintendent of the district, in which they sought permission to hold the Club's weekly after school meetings in the school cafeteria¹²". Attorneys for the Good News Club described its activities as follows:

The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, inter alia, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization¹³.

The Superintendent denied the request because "the kinds of activities proposed to be engaged in by the Good News Club were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself". The Milford Board of Education affirmed the Superintendent's judgment in a resolution rejecting the Club's request to use the Milford School facilities "for the purpose of conducting religious instruction and Bible study".

Writing for the Court in an opinion joined by the Chief Justice and Justices Scalia, O'Connor, and Kennedy, Justice Thomas observed that since there was no dispute that the state had created a "limited public forum", the questions before the Court were: 1) "[W]hether Milford Central School violated the free speech rights of the Good News Club when it excluded the Club from meeting after hours at the school", and 2) "whether any such violation is justified by Milford's concern that permitting the Club's activities would violate the Establishment Clause".

Concluding that "Milford's restriction violates the Club's free speech rights", the Court applied the general rule that the determination concerning the constitutionality of a State's excluding "a private speaker from use of a public forum depends on the nature of the forum¹⁴". Relying on its holdings in *Rosenberger v. Rector and Visitors of Univ. of Virginia*¹⁵, and

¹² *Id.*, 121 S.Ct. at 2098.

¹³ *Idem.*

¹⁴ 121 S.Ct. at 2099, citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 44, (1983).

¹⁵ 515 U.S. 819, 829 (1995).

*Lamb's Chapel v. Center Moriches Union Free School District*¹⁶, the Court found that "any group that 'promote[s] the moral and character development of children' is eligible to use the school building". The Good News Club was excluded even though an examination of the content of its activities demonstrated that the "Club sought to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint¹⁷". The "exclusion of the Club on the basis of its religious perspective" was therefore "unconstitutional viewpoint discrimination"¹⁸.

For the dissenters in *Good News Club*, the problem with the majority's approach begins with the "level of generality" it chose to describe the type of speech involved. In the view of the dissenters, there is a difference between speech about secular subjects from a religious viewpoint, and speech that is an integral part of religious practice, ritual, proselytization, or evangelism. Justice Stevens' dissent draws the distinctions as follows:

Speech for "religious purposes" may reasonably be understood to encompass three different categories. First, there is religious speech that is simply speech about a particular topic from a religious point of view. Second, there is religious speech that amounts to worship, or its equivalent. Third, there is an intermediate category that is aimed principally at proselytizing or inculcating belief in a particular religious faith. ... The novel question that this case presents concerns the constitutionality of a public school's attempt to limit the scope of a public forum it has created. More specifically, the question is whether a school can, consistently with the First Amendment, create a limited public forum that admits the first type of religious speech without allowing the other two¹⁹.

Justice Souter's dissent agrees that these are real distinctions, and takes the majority to task for not grappling with them directly: "The majority avoids [the problem that this is a worship service that calls for religious conversion of the participants] only by resorting to the bland and general characterization of Good News's activity as teaching of morals and character, from a religious standpoint²⁰". Justice Stevens agrees: "[t]he majority elides the distinction between religious speech on a particular topic and religious speech that seeks primarily to inculcate belief²¹".

¹⁶ 508 U.S. 384 (1993).

¹⁷ *Id.*, at 2101.

¹⁸ *Id.*, at 2100, n. 2.

¹⁹ *Id.*, 121 S.Ct. at 2112-2113 (Stevens, J., dissenting) (emphasis added).

²⁰ 121 S.Ct. at 2117 (Souter & Ginsburg, JJ., dissenting).

²¹ *Id.*, at 2114, n.3.

The majority, by contrast, simply "disagree[d] that something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint".

What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons. It is apparent that the unstated principle... that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a "pure" discussion of those issues²².

The votes in *Good News Club* indicate that the Justices take the following positions concerning the use of the Establishment Clause as a defense in public forum cases:

| | |
|---|---|
| Chief Justice Rehnquist & Justices Scalia, O'Connor, Kennedy & Thomas | When the limited forum is public and fairly administered, the Establishment Clause is not a defense to a charge of content or viewpoint discrimination. |
| Justice Breyer | Neutrality is only one factor to be examined in an Establishment Clause analysis. A further endorsement analysis is also required. |
| Justice Stevens | The government may not exclude from a limited public forum either religious speech that is simply speech about a particular topic from a religious point of view, or religious speech that amounts to worship, or its equivalent. |
| Justices Souter & Ginsburg | The government may – and perhaps must – exclude proselytization and worship from a limited public forum conducted on public school premises. |

²² 121 S.Ct. 2102 (majority opinion).

II. CONCLUSION

The Court's jurisprudence of the first amendment is rapidly approaching the point where it can be said that a process of "integration" is taking place. It will take several years before the implications of this trend are clear, but preliminary indications are that the Court is less concerned about the content or perspective of the *speaker*, than on the intent of government officials who would restrict their speech²³. Were such reasoning to be applied in cases involving state-supported education at the elementary and secondary school levels, the law of the Establishment Clause would be subject to a major overhaul. Several cases pending in the state and lower federal courts raise precisely these issues²⁴.

In sum, the 2000 Term of the United States Supreme Court did not involve any major religious liberty cases, but the one case the Court did decide offered a useful perspective whether, and to what extent, the Justices are willing to "integrate" their views on freedom of speech, press, and association with their views on freedom of religion. The issue is increasingly important in the modern administrative state, and one can rest assured that the Court will revisit the issue many times in the years to come²⁵.

²³ See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S.Ct. 2446 (2000) (State human rights laws may not be used to compel private organization to admit leaders who do not comply with its standards of conduct); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 115 S.Ct. 2338 (1995) (Local human rights statutes may not be used to compel a parade organizer to admit a group to march in the parade if the organizers do not agree with the group's message).

²⁴ Compare *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 711 N.E.2d 203, 214 (1999) (upholding on state and federal constitutional grounds an Ohio law providing subsidies for children enrolled in all private and public schools, including religious schools) with *Simmons-Harris v. Zelman*, 234 F. 3d 945 (6th Cir. 2000), certiorari granted, 533 U.S. 976, 122 S.Ct. 23 (2001) (No. 00-1779) (federal appeals court judgment striking down the same statute on federal constitutional grounds).

²⁵ See, e.g., *Catholic Charities of Sacramento Inc. v. Superior Court of Sacramento County*, 109 Cal. Rptr. 2d 176 (Cal. App., 3d Dist. 2001), review granted, 31 P.3d 1271, 112 Cal.Rptr.2d 258 (Cal. Supreme Ct. 2001) (Catholic employer could be compelled by state human rights law to provide contraceptive benefits to its employees).